(9)

No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST C. ROE, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

BILL LOCKYER
Attorney General
DAVID DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WARD A. CAMPBELL, Assistant
Supervising Deputy Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
*PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5290
Fax: (916) 324-2960
Counsel for Petitioner

20pp

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ARGUMENT[1]

I.

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO APPEAL A CRIMINAL CONVICTION

Respondent Ortega ("the Prisoner") argues that the "right" to appeal is a "fundamental right" which counsel must preserve unless the defendant waives it. Resp. Br. at 17. As the Prisoner and amicus National Association of Criminal Defense Lawyers ("NACDL") acknowledge, there is no federal constitutional right to appeal a criminal conviction. *McKane v. Durston*, 153 U.S. 684, 687 (1894); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996); Resp. Br. at 7; NACDL Br. at 6 n.3. Thus,

1. Petitioner ("the Warden") does not repeat all of the arguments made in the Brief for Petitioner. The failure to repeat a previously-made argument should not be construed as a waiver of such argument.

the right at stake in the present case is not a federal constitutional right. It follows that the "right" to appeal a criminal conviction and sentence is not a "fundamental right" which defense counsel must preserve unless the defendant waives it. Resp. Br. at 17.

Where the state creates a right to appeal there are constitutional implications. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). However, these constitutional implications do not include an absolute right to counsel's advice concerning appeal after a guilty plea. *See e.g., Marrow v. United States*, 772 F.2d 525, 528 (CA9 1985). Nor do they include an absolute right to file a belated post-plea appeal unless the defendant consented to the abandonment of his appeal.

II.

THE PRISONER FAILS THE *STRICKLAND* TEST BECAUSE HE DOES NOT SHOW ANY PREJUDICE FROM THE ALLEGED ERRORS BY COUNSEL

Amicus Criminal Justice Legal Foundation (CJLF) has argued persuasively for the application of the "*Strickland*" prejudice standard. CJLF Br. at 8-17. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), requires defendants to make two showings to establish a Sixth Amendment violation based on ineffective assistance of counsel: first, that counsel's performance was so lacking as to fall below an objective standard of reasonableness; *and* second, actual prejudice from the inadequate performance, meaning that there is a "reasonable probability" that the outcome would have been different but for counsel's errors. *Id.* at 687-90. The Prisoner has not even attempted to show that he had any grounds for a meritorious appeal. Nor could he. Petr. Br. at 24. Absent such a showing he cannot satisfy the prejudice prong of the test.[2]

The natural reading of the prejudice prong is that the defendant must show that he would have prevailed on the merits had adequate counsel been provided. The Prisoner's refusal even to address the substance of his hoped-for appeal means he fails that test. The Prisoner therefore asserts that he is prejudiced if he would have filed an appeal had he been given adequate counsel, regardless of the merits of the appeal. Surely, however, a defendant is only prejudiced by a failure to file an appeal if there were credible arguments to be made on

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2. The remainder of Argument II assumes for the sake of argument that the Prisoner could meet the first prong of the *Strickland* test.

appeal. At the very least, absent any showing in the record that the Prisoner had a single meritorious claim on appeal, there is no basis upon which to assume that were he competently counseled he would have filed an appeal. The fact that the Prisoner filed a late appeal on his own initiative tells us nothing about whether he would have filed one if were informed by counsel that he had no non-frivolous grounds upon which to appeal.

III.

THE *PER SE* RULES THE PRISONER PROPOSES TO OVERCOME THE ABSENCE OF PREJUDICE ARE CONTRARY TO SOUND LAW AND POLICY

Because his inadequate assistance of counsel claim fails if the *Strickland* test is applied, the Prisoner proposes that this Court adopt *per se* rules that assume prejudice. His inability to show any prejudice in his own case speaks volumes about why a *per se* ineffective assistance of counsel rule makes no sense in the context of appeals following guilty pleas. A *per se* rule only makes sense when it reaches the right result the large majority of the time. *See Strickland*, 466 U.S. at 692 (prejudice is presumed where prejudice is so likely that case-by-case inquiry is not worth the cost); *United States v. Cronic*, 466 U.S. 648, 658 (1984) (prejudice is presumed where the circumstances are so likely to have prejudiced the accused that the cost of litigating their effect in a particular case is unjustified); *cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time[]"). But if defendants who plead guilty cannot show prejudice most of the time, the proposed *per se* rules will often produce the wrong result. The Prisoner has failed to demonstrate that defendants who plead guilty would usually be prejudiced by failing to appeal. For this and the reasons discussed below, his proposed *per se* rules are insupportable.

1. The Prisoner devotes a scant three pages of his brief (Br. at 17-20) to defending the *per se* rule created by the Ninth Circuit -- that unless a defendant consents to counsel not filing an appeal following a guilty plea, a Sixth

Amendment violation will be presumed even if he never instructed counsel to file an appeal. Given the myriad practical difficulties with that rule, it is not surprising that the Prisoner directed most of his attention elsewhere. As set forth in the Warden's opening brief (Br. at 10-14, 17-20) and the amicus brief of the United States (Br. at 14-17), the Ninth Circuit's *per se* rule ignores the fact the there is nothing unusual about defendants not filing appeals following guilty pleas and there are relatively limited grounds for challenging guilty pleas and the resulting sentences. This means that there is nothing presumptively "ineffective" about a counsel's decision not to appeal a guilty plea. Moreover, the absence of consent is easy to allege and difficult to disprove, which makes the proposed *per se* rule subject to abuse, in contravention of the goals of finality and speed that underlie most plea agreements.

Finally, as discussed in the Warden's opening brief (Br. at 7-8), affirmance of the Ninth Circuit's judgment would lead to state and/or federal habeas litigation over the revival of defaulted, meritless, post-plea appeals. NACDL claims that affirmance of the Ninth Circuit's judgment would not require lower courts to grant habeas relief; instead, lower courts would merely have to hold hearings to decide whether defense counsel failed to consult with the defendant and whether the defendant consented to forgo an appeal. NACDL Br. at 21 n.15. Of course, even hearing such cases would be burdensome to the lower courts. Further, many defendants would attempt to litigate adverse rulings from such hearings. As the Warden has pointed out, if the Ninth Circuit's judgment stands, every defendant in the Ninth Circuit who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, at least if his/her case became final after *Lozada v. Deeds*, 964 F.2d 956 (CA9 1992). Litigating these cases, especially since they require evidentiary hearings, would

indeed be burdensome to the states included in the Ninth Circuit. Moreover, most of the resulting requests for certificates of probable cause (generally required for post-plea state court appeals in California) and subsequent appeals will be meritless as they will have arisen out of guilty pleas. At the very least, if this Court adopts the rule the Prisoner seeks, this Court should state that it is announcing a "new rule" which will not be applied retroactively.[3]

2. The Prisoner devotes most of his argument to creating and defending an alternative *per se* rule: that a criminal defendant who pleads guilty is automatically entitled to a new appeal if defense counsel failed to advise him about the right to appeal. Resp. Br. at 7-17, 19-24. This *per se* rule, too, is contrary to logic and most lower court opinions. *See* Petr. Br. at 9-14, 17-20; U.S. Br. at 21-25. It is not the Warden's position that counsel *never* has the duty to advise a defendant who pled guilty about his appeal rights. As stated in the opening brief, the Warden agrees with the Ninth Circuit's holding in *Marrow v. United States*, 772 F.2d at 528:

> We conclude that there is no duty in all cases to advise of the right to appeal a conviction after a guilty plea. Rather, counsel is obligated to give such advice only when the defendant inquires about appeal right or when there are circumstances present that indicate that

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3. CJLF correctly notes that the result the Prisoner seeks is barred by *Teague v. Lane*, 489 U.S. 288 (1989). CJLF Br. at 18-20. This argument is not foreclosed by the denial of certiorari on Question 1 of the Warden's certiorari petition. CJLF Br. at 18. In attempting to rebut CJLF's *Teague* argument, the Prisoner cites case law for propositions far too general too establish that his proposed rule was "dictated by precedent." Resp. Br. at 22-23 n.14; *cf. Sawyer v. Smith*, 497 U.S. 227, 236 (1990) ("clearly established law" test is not to be applied in an overly general manner).

defendant may benefit from receiving such advice.

Numerous other federal courts of appeal and state supreme courts have held the same.[4] There is therefore no merit to the NACDL's contention (Br. at 19) that no jurist takes the position that it is not part of counsel's function to discuss the pros and cons of appeal with the client.

There are myriad reasons why it is reasonable for counsel to assume that a defendant who pled guilty does not wish to appeal and why, therefore, there is no recognized constitutional right to advice regarding appeals following guilty pleas. Among them are:

- A guilty plea waives numerous appellate issues, *see* Petr. Br. at 10-14, and sentencing issues are almost always addressed in the negotiation or structuring of the plea. *See* U.S. Br. at 16. As a consequence, there will often be no non-frivolous issues to appeal (unlike the situation following convictions by trial).
- As noted in *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 466 U.S. at 691. By pleading guilty, a defendant generally manifests a desire to terminate the litigation.
- More specifically, a defendant demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for rehabilitation in a shorter time period than would otherwise be necessary. *See Brady v.*

4. *See Hardiman v. Reynolds*, 971 F.2d 500, 506 (CA10 1992); *Laycock v. New Mexico*, 880 F.2d 1184, 1187-88 (CA10 1989); *Carey v. Leverette*, 605 F.2d 745, 746 (CA4 1979), *cert. denied* 444 U.S. 983 (1979); *Langford v. State*, 531 So.2d 944, 944 (Ala. Crim. App. 1988); *State v. Miller*, 278 Mont. 231, 234, 924 P.2d 690, 691 (Mont. 1996); *Thomas v. State*, 979 P.2d 222, 223 (Nev. 1999); *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (S.C. 1995).

United States, 397 U.S. 742, 753 (1970), *cited at* Petr. Br. at 13.

- Even in those cases where the defendant pleads guilty without actually admitting his guilt, the guilty plea usually indicates a desire to avoid the risk of greater punishment. As the Prisoner and his amicus note, an appeal can expose the defendant to the possibility of a more severe sentence. Resp. Br. at 16-17 n.10; NACDL Br. at 15. That works against their position. As a general rule it is reasonable for an attorney to conclude that his risk-averse client, who has just opted for the security of a plea bargain, does not wish to forfeit that security and take his chances on appeal.
- Post-plea advice as to appellate remedies will merely tend to build false hopes and encourage frivolous appeals, with the resulting expense to taxpayers. *See* Petr. Br. at 18 (citing *Marrow*, 772 F.2d at 528 and notes of the Advisory Committee on the Federal Rules of Criminal Procedure).

The defendant received the benefit of his attorney's advice prior to the entry of the plea. Indeed, it is because of the attorney's advice that the defendant has pleaded guilty, largely foreclosing appeal. Thus, there is no reason to create an absolute duty by counsel to advise of appeal rights after a guilty plea. In fact, by entering the plea, the defendant has demonstrated that he intelligently understands what he is doing and the consequences of his plea.

Thus, although there may be instances in which counsel will have a duty to advise the defendant of appeal rights after a guilty plea, such instances will be limited. Neither litigation realities nor the authorities support the creation of an absolute duty by counsel to advise of appeal rights after all guilty pleas. The Prisoner audaciously claims that it is speculative to suggest that when a defendant pleads guilty he manifests a desire to end the litigation. Resp. Br. at 17. But as the party

seeking to create a new *per se* rule, the burden is on the Prisoner to demonstrate the converse: that defendants pleading guilty generally wish to continue pursuing the litigation. This he cannot do, for certainly, with few exceptions, the defendant who pleads guilty seeks to avoid the risk of further litigation.[5] Whether plea agreements sometimes reserve appeal rights (as the Prisoner asserts at 17) is irrelevant. Such reservations tell us nothing about how often appeals following guilty pleas are filed and the general mindset of defendants who plead guilty.[6]

In most guilty plea cases there are no grounds for appeal. Hence, there is no reason to establish a constitutional presumption of ineffective assistance where no appeal is filed.

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5. The Warden acknowledges that there may be exceptional circumstances in which a defendant pleads guilty but nevertheless wishes to pursue an appeal. For example, if a defendant's suppression motion is denied, he may plead guilty with the intention of litigating the matter on appeal. Cal. Penal Code § 1538.5(m). Indeed, such an appeal may be part of the plea bargain. This is not the case here.

6. In the present case, despite whatever conversation may have occurred between the Prisoner and trial counsel (Petr. Br. at 5; J.A. 133), the Prisoner failed to request an appeal. Petr. Br. at 15-16.

IV.

JUDICIAL ADVISEMENTS OF APPEAL RIGHTS SHOULD PROMPT A REASONABLE DEFENDANT TO ASK ABOUT APPEAL

The Prisoner and NACDL complain that a judicial advisement of appeal rights is not sufficient for a defendant to make an informed decision about whether to appeal. Resp. Br. at 9; NACDL Br. at 23. However, a judicial advisement of appeal rights should prompt a reasonable defendant, if interested in appealing, to ask his attorney about an appeal. Indeed, it is hard to think of any other purpose for the advisement. Upon inquiry by the defendant, the attorney would then have a duty to advise the defendant concerning appeal. *See e.g., Marrow*, 772 F.2d at 528.

The Prisoner speculates that the right to appeal is not a matter of common knowledge. Resp. Br. at 8. The Warden submits that the right to appeal is likely to be a matter of common knowledge among criminal defendants. Petr. Br. at 15, citing *Castellanos v. United States*, 26 F.3d 717, 719 (CA7 1994). It is reasonable to assume that defendants have knowledge of the right to appeal from the widespread public awareness of the right to appeal, stemming from, inter alia, innumerable media reports on criminal cases and judicial opinions, their prior experiences with the criminal justice system, or the experiences of other criminal acquaintances.

Where there has been judicial advice of the right to appeal, there is no reason to presume ineffective assistance of counsel where no notice of appeal is filed after a guilty plea. This is especially true where defendants are given a substantial amount of time to file a notice of appeal. California Rules of Court, Rule 31(a), (d) (sixty days to file).

In Appendix A to the Brief for Respondent, the Prisoner provides a list of states in which judicial advisement of appeal rights is not required following a guilty plea. That many states do not advise defendants of post-plea appeal rights merely underscores the fact that post-plea appeals are uncommon (at least compared to post-trial appeals) and post-plea appeals are disfavored (probably because they are likely to be meritless). Further, post-plea appeals are contrary to the policy of allowing pleas as an early end to litigation.

That many states disfavor post-plea appeals also highlights an important federalism concern. Such states have a policy disfavoring post-plea appeals for the sound reason that such appeals generally consume scarce judicial resources with meritless claims. It is reasonable for a state to conclude that this waste of judicial resources is to be discouraged; this Court should respect that decision. *Cf. Johnson v. Fankell*, 520 U.S. 911, 923 n.13 (1997) (it is a matter for each state to decide how to structure its judicial system); *McKane*, 153 U.S. at 688 (whether an appeal should be allowed, and, if so, under what circumstances, are matters for each state to determine).

Moreover, the Prisoner's statistics on the success rate of post-plea appeals (Br. at 15) do not take account of post-plea appeals that are weeded out by the denial of a certificate of probable cause. In California, a certificate of probable cause is a prerequisite to a post-plea appeal affecting issues of actual guilt or innocence. Cal. Penal Code § 1237.5; Cal. Rules of Court, Rule 31(d). Further, California's certificate of probable cause procedure reflects a reasonable legislative determination that most post-plea appeals are meritless.

V.

THE PRISONER AND NACDL FAIL TO DISTINGUISH BETWEEN POST-TRIAL APPEALS AND POST-GUILTY PLEA APPEALS

Virtually all of the authorities cited by the Prisoner and NACDL are distinguishable because they involve appeals from convictions by trial, not guilty pleas. As noted, a guilty plea manifests a desire to accept responsibility or to terminate the litigation.

The Prisoner cites a number of circuit court cases to support his assertion that the Sixth Amendment mandates competent advice and consultation regarding the right to appeal. Resp. Br. at 10. All of these cases are distinguishable because they involve appeals from convictions by trial. Resp. Br. at 10; *see also* NACDL Br. at 12 (text), 18. The Prisoner claims that where the defendant has not communicated to his attorney his decision on whether to appeal, counsel must preserve the defendant's right to appeal. Resp. Br. at 19. However, all but one of the cases the Prisoner relies on for this proposition involve convictions by trial.[7] Even most of the cases the Prisoner cites for more general propositions involve convictions by trial, not guilty pleas. *See e.g.*, Resp. Br. at 8-9, 19-20.[8] Many other cases cited by NACDL are trial cases. *See* NACDL Br. at 13, 14, 18.

Other authorities cited by the Prisoner and NACDL are likewise inapposite. The cited American Bar

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7. *United States v. Stearns*, 68 F.3d 328 (CA9 1995) the only plea case, was wrongly decided. Petr. Br. at 9-27.

8. *Estes v. United States*, 883 F.2d 645, 649 (CA8 1989) is a plea case but involves a purported request for appeal. *Hill v. Lockhart*, 474 U.S. 52, 54-55, 60 (1989) is a plea case but does not concern counsel's post-plea duties as to appeal.

Association ("ABA") standard fails to distinguish between post-plea appeals and post-trial appeals. Resp. Br. at 12; NACDL Br. at 18-19 n.13. The better approach is the older and wiser ABA standard which sensibly limited the trial court's duty to advise of appeal rights to "contested cases." Petr. Br. at 18, quoting *Marrow*, 772 F.2d at 528. Further, another ABA standard states that a court should not accept a guilty plea unless the defendant understands that by pleading guilty he is largely waiving his right to appeal. ABA Standards for Criminal Justice, Standard 14-1.4(a)(vi) (3d ed. 1997). Finally, the fact that the ABA has recognized a given practice as desirable does not mean that the practice is required by the Constitution. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983); *see also Strickland*, 466 U.S. at 688-89 (no set of rules, including the ABA rules, can take account of the range of legitimate attorney decisions).

The Prisoner also cites the Restatement as to a lawyer's duty to consult with his client. Resp. Br. at 13, 18. This generalized standard does not necessarily apply to criminal appeals and certainly does not shed any light on the specific situation of advice following a guilty plea. Arguably, an attorney meets the standard by consulting with the client prior to the plea. Further, the Prisoner and NACDL misinterpret California Penal Code § 1240.1(a). Resp. Br. at 12-13 n.5; NACDL Br. at 19. It is clear from the language of § 1240.1(a) that counsel has a duty to advise about appeal rights only where counsel represented the defendant "at trial." Petr. Br. at 23. The introductory language of § 1240.1(a), making that section applicable to any noncapital criminal case where the defendant would be entitled to appointment of counsel on appeal, limits the section to trial cases which are noncapital and involve indigent defendants.

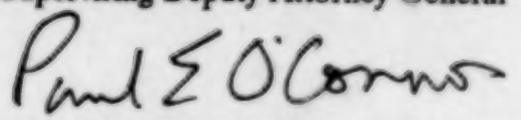
CONCLUSION

Accordingly, the Warden asks that this Court reverse the judgment of the Ninth Circuit.

Dated: September 2, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WARD A. CAMPBELL
Assistant Supervising Deputy Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General



PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

PEO:sc